In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-370

NICK SCAGLIONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on five counts of having knowingly caused gambling paraphernalia (consisting of flash paper) to be sent in interstate commerce, in violation of 18 U.S.C. 1953. He was sentenced to concurrent prison terms of four years. The court of appeals affirmed (Pet. 9-19).

Some of the evidence used to convict petitioner was obtained under a search warrant charging vio-

lations of the wagering tax statutes (26 U.S.C. 4411, 4412, 4901 and 7203). The warrant was issued and the evidence was seized in April 1965, prior to *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62. The principal issue presented by this petition is whether such evidence was properly admitted in petitioner's trial, which was conducted in 1969, for violations of a different statute. All of the courts of appeals which have considered this question have held, like the court below, that *Marchetti* and *Grosso* do not bar the use in a collateral prosecution (such as here) of evidence seized in these circumstances. See *United States* v. *Hanon*, 428 F.2d 101 (C.A. 8), certiorari denied, 402 U.S. 952; *United States* v. *Tiktin*, 427 F.2d 1027 (C.A. 6), certiorari denied, 402 U.S. 950; *DiPiazza* v. *United States*, 415 F.2d 99 (C.A. 6), certiorari denied, 402 U.S. 949; see also *Washington* v. *United States*, 402 F.2d 3 (C.A. 4), certiorari denied, 402 U.S. 978. This Court denied review in those cases subsequent to its decision in *United States* v. *United States Coin and Currency*, 401 U.S. 715.[1]

Petitioner also contends that reversible error was committed because of a jury inquiry to a marshal and the closing argument of the prosecutor. These issues, which petitioner concedes do not by themselves warrant issuance of the writ (Pet. 7), are

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[1] The same issue is presently before this Court in *Jernek* v. *United States*, pending on a petition for a writ of certiorari, No. 71-72, this Term.

fully canvassed in the opinion below, on which we rely (see Pet. 16-18).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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